Oral History of
HONORABLE FRANK Q. NEBEKER
Sixth Interview
November 23, 2004

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is the Honorable Frank Q. Nebeker, Senior Judge, District of Columbia Court of Appeals, and the interviewer is David W. Allen. The interview took place on November 23, 2004. This is the sixth interview.

Mr. Allen: This is the continuation of the oral history of Frank Nebeker. We are well into his judicial career on the D.C. Court of Appeals. Last time, we talked about health care cases and the no-cite rule, and today Judge Nebeker is going to dedicate most of the time to the *Willie Lee Stewart* case. Judge Nebeker?

Judge Nebeker: Willie Lee Stewart had quite a series of episodes beginning in 1953 through almost ten years. He was charged with and convicted of killing a grocery store proprietor, small mom-and-pop shop in 1953. He was convicted and sentenced to death by Judge Schweinhaut. On appeal in 1954, a panel of the D.C. Circuit comprised of Judges Bazelon, Edgerton and Washington, reversed the conviction on the thesis that the instructions to the jury with respect to mental disease and mental disorder were confusing and particularly that the instruction that a psychopath was not an insane person. That was found to be error. Besides that, the court said that Willie Lee

Stewart should be tried under the just-announced rule of *Durham v. United States* --

Mr. Allen: May I stop and ask a clarifying question so that the people reading this and never hearing it will understand.

Judge Nebeker: Sure.

Mr. Allen: At this time, a trial court was then U.S. District Court?

Judge Nebeker: Yes.

Mr. Allen: Because that would be where a felony of that magnitude would have been tried?

Judge Nebeker: That is correct.

Mr. Allen: And so there would be, of course, a direct appeal to the D.C. Circuit?

Judge Nebeker: As a matter of right, there was a direct appeal to the D.C. Circuit. The D.C. court system was misdemeanor and limited civil jurisdiction with an appeal certiorari-type appeal from the D.C. Court of Appeals or then known as the Municipal Court of Appeals to the D.C. Circuit. The court of general jurisdiction was the federal District Court in addition to its federal jurisdiction.

Mr. Allen: So this was before general jurisdiction was conferred on the D.C. Superior Court for crimes?

Judge Nebeker: Yes.

Mr. Allen: There is still a choice even now whether to go federal with some crimes that are committed in D.C. if there is federal jurisdiction for them, but otherwise, it's the D.C. Superior Court and its appellate court for –

Judge Nebeker: For offenses that are in the D.C. Code, as distinguished from the U.S. Code, they are prosecuted here in the D.C. court system. My understanding is if there is a combination of 18 U.S. Code federal criminal code violations and D.C. Code they can be joined and tried in the federal District Court. I don't know that that happens very often. Back at this time, the U.S. District Court had all the common law felony offenses. The only thing that was tried in the local courts were petty offenses. It grew a little later on to being misdemeanors as well.

Mr. Allen: So, what you have just described is the holding on the first appeal that occurred —

Judge Nebeker: Now for posterity, for ease of research, the citation to that case, and I should have the others – I do – is 94 U.S. App. D.C. at 293. So, the case was remanded for retrial and he was again convicted and sentenced to death, this time before Burnita Matthews. By this time the court had decided that it would automatically go *en banc* to begin with, rather than have it reviewed by a panel and then go through the petition for rehearing *en banc* because I think the consensus was they knew they were going to go *en banc* in any capital case before they could affirm it. By 1957, the *en banc* court entertained the second appeal and found the basis to reverse on the basis

plain error because the prosecutor argued his own personal views as to credibility, such as, "I think Dr. Williams is mistaken." Dr. Williams was a defense psychiatrist. As I said, the court, five-to-four, found it to be plain error because there had been no objection to the closing argument of the prosecutor.

Mr. Allen: And had the prosecutor simply said, "Dr. Williams is mistaken," it would not have raised —

Judge Nebeker: That's a little closer, but it still had the flavor of, I know something that's not in evidence, and that's the basis upon which you don't let a prosecutor argue in such a fashion that he implies or that the jury might infer that he knows something that they don't know. That's why the argument is better: I submit you could find that this doctor is mistaken based upon the evidence in this case. All right, it was remanded, then, for a third trial and by 1960, the appeal was back to the Court of Appeals *en banc* and that cite is 101 U.S. App. D.C. at 51. In this one, the prosecutor in cross-examining Stewart, asked him, "This is the first time you have taken the stand, isn't it Willie?" Stewart had not taken the stand in the two previous trials, but he took the stand in this particular case and the Court of Appeals affirmed that conviction by a vote of five-to-four. Interestingly enough, Judge Burger voted to reverse. The petition was granted in the Supreme Court. At 366 U.S. 1., the Supreme Court reversed that conviction on the rationale that the jury was now told that he had been tried before and convicted, not that he

had failed to take the stand before. That was not the sin; the sin was that he had been tried and convicted before and so Willie Lee Stewart had to be tried again.

Mr. Allen: This would be the fourth time?

Judge Nebeker: This would be the fourth time and he was convicted by capital verdict again.

Mr. Allen: What year are we by the fourth appeal?

Judge Nebeker: The fourth appeal is 1963. And at this juncture I was Chief of the Appellate Division. I remember assigning a very competent young man by the name of Gerald A. Messerman to write the government's brief. An attorney by the name of Robert Martin had written a brief for Stewart; he was court-appointed, and it was a 65-page brief raising numerous issues. Five issues with subdivisions – no, by gosh, nine issues with subdivisions in some of them. The government's brief addressing each one of them was filed and it was an extremely lengthy brief as well. As the argument date became close, Gerry Messerman and I conferred and we concluded that given the history of this case and the fact that it was now capital verdict in 1963 and the capital verdicts were beginning to be disfavored and certainly by the D.C. Circuit, we in all probability could not sustain this conviction, though neither of us at this point can remember which of the myriad issues raised was the one likely to capture the attention of the *en banc* court, but we had no confidence that we could sustain the conviction. As a result, I went to U.S. Attorney David Acheson, who just before this fourth trial had refused

to take second degree murder as a plea, and I informed him of our view that we could not sustain this conviction and that the system, the criminal justice system, would really have a black eye if this was yet to be tried for a fifth time. Under the circumstances I suggested that I go with Mr. Martin to Chief Judge Bazelon and urge that we would accept a plea to second degree murder if the court would remand the record to the trial court for purposes of taking the plea. I was concerned that if the court remanded the case, there might be the possibility of double jeopardy clouding this issue and this matter even further. With the authority of the U.S. Attorney I went to Judge Bazelon and made the proposal. He was genuinely surprised that the government would take this kind of a position, but I explained to him that we really felt that the handwriting on the wall would be such that there would be yet another reversal of this man's conviction. I asked him if he would go to the full court with the proposal and then inform us whether the argument was going to go forward or whether they would remand the record. Shortly thereafter I received a communication that the court was in agreement that it would remand the case. My chore then was to go to the trial judge, Alexander Holtzoff, and convince him to take the plea. That was not an easy task. For anyone who knows Judge Holtzoff knows that he was at the time a very demanding and a very strict but brilliant U.S. District Judge. I can recall going into his chambers with this proposal and though he was a man of very short stature, when he would begin to be upset, would

bounce up and down a little bit in his chair, and he indeed began to bounce up and down in his chair with this proposal.

Mr. Allen: This is a great image to try and visualize.

Judge Nebeker: He used to do that on the bench as well when he was upset with counsel. As I say, he was a very demanding man. You did not cross your legs at counsel table; you did not put a briefcase on counsel table, you kept it on the floor; when you addressed the judge, you addressed him from the lectern and you did not communicate with opposing counsel.

Mr. Allen: Those rules are often – at least they are expected to be observed in most good court rooms.

Judge Nebeker: That's true, but I'll tell you, it was almost a capital offense if you violated one of those rules with Alexander Holtzoff. In any event, eventually he agreed – and he also agreed that he would order Stewart to be examined by a St. Elizabeth's psychiatrist to ensure that Stewart would not try to vacate this plea or collaterally attack his conviction on it based on incompetence to enter the plea of guilty. So, Judge Holtzoff appointed a psychiatrist by the name of Jim Ryan who had been on the staff at St. Elizabeth's Hospital during that time. Incidentally, Ryan had also put himself through Georgetown Law School in about two and a half years, so he was a forensic psychiatrist. Well, Ryan examined Stewart a week before the plea and concluded and reported that he deemed him to be competent to enter the plea. We then had him examine Stewart the very morning of the plea and

he came to the courtroom and announced to Judge Holtzoff and the rest of us that he deemed Stewart competent to enter his plea of guilty. Then Stewart was brought out. The tension in that courtroom almost crackled as we waited to see if Stewart would, in the words of Shakespeare, "speak the speech trippingly on the tongue." He went through Rule 11 with Judge Holtzoff. He answered all the questions the way he should in order to enter the plea of guilty. Judge Holtzoff accepted the plea of guilty and sentenced Stewart to life in prison and, as I recall, added orally to the sentence that he should not be paroled without the express consent of Judge Holtzoff. Well, of course, that was not a legally enforceable condition, but nonetheless I guess it made the Judge feel better. I have attempted in the meantime to locate Stewart, assuming he was about 20 years old at the time. That would make him —

Mr. Allen: Twenty in 1953?

Judge Nebeker: Twenty in 1953. That would make him in his 70s now, but the Bureau of Prisons doesn't have any record, and I don't have his prison numbers or whatever, so I have been unable to determine whether Stewart is alive or dead at this point.

Mr. Allen: It must have been a fair challenge for his lawyers to get him up to the point of accepting this plea of —

Judge Nebeker: I'm sure it was. Mr. Martin was a very competent and capable man. I did call him a few months ago in Florida to see if he could remember anything

about what the best issue was – the one that we thought he would win and we would lose on – and I must report that Mr. Martin is not in the best of mental or physical health at this point and he really couldn't recall. In fact, he didn't recall representing Stewart until I refreshed his memory quite deeply before he could recall that but he could recall nothing of the case. Well of course at that juncture, we filed a motion in the Court of Appeals to dismiss the appeal with prejudice because Stewart had entered the plea of guilty, as the Court of Appeals' order permitted him to do. If he had not entered the plea of guilty, then the record would have been returned to the circuit court where oral argument and appellate review would have continued in ordinary course, thus avoiding any possibility that a double jeopardy plea could be made at sometime in the future. And we've heard nothing further from Stewart. To my knowledge, he never filed a 2255 petition, collaterally attacking his plea of guilty. He never filed a motion to withdraw his plea of guilty, and I do know that when I first proposed this disposition to Mr. Martin, he told me that Willie Lee Stewart was so afraid of the death penalty that he was perfectly willing to enter a plea to second degree murder. So that's the end of the Willie Lee Stewart saga.

Mr. Allen: Four trials?

Judge Nebeker: Four trials, three appeals, three reversals and a fourth very likely. Stewart was absolutely convinced, according to Mr. Martin, that if he was retried a fifth time, he would be sentenced to death again and he wanted to avoid that

at all cost, and so that's the reason he was willing to enter a plea. As I say, he had offered to enter a plea earlier, and the U.S. Attorney refused it. The joint appendix of that record reflects that the prosecutor, Alfred Hantman and David Acheson personally appeared in court and rejected the plea offer to second degree murder. He was then tried, and when the record on appeal was put together, Acheson changed his mind and was willing to accept the plea.

Mr. Allen: That was mainly the work of you and the lawyer working for you, Gerry Messerman? —

Judge Nebeker: Gerry Messerman, yes.

Mr. Allen: — convincing him that this was a case that still had this destiny about it if you had taken it up —

Judge Nebeker: With a capital verdict, the judgment of conviction was a snake pit, and we were fairly confident that we could not sustain it; realized it at that time the composition of the Court of Appeals was pretty much five to four or even six to three on occasions, favoring the appellant in criminal prosecutions and particularly a capital verdict.

Mr. Allen: Well, this case had Judge Burger, a fairly well known conservative, although careful middle-of-the-road, I'd think, on figuring these kinds of issues, voting for reversal at one point when the case went up and then the Supreme Court sent it back, so it certainly was replete with issues that were thorny.

Judge Nebeker: It was indeed, and as I say, there were many issues. I don't know that it would pay for this history to go into those myriad issues that were raised on appeal. Incidentally, I can tell you this. One issue that was raised was the exclusion of blacks from the jury by the prosecutor. Now, of course, that was way back then and that issue could have been won that we felt we couldn't win before that court. And of course, it's finally the day of peremptory challenges excluding on the basis of gender or race had yet to come but, as we all know, it did come in just the last few years. Yes, that was one of the issues that we were afraid of. I'm confident that we would wind up with a lot of convictions being set aside because there had been systematic exclusion through peremptory challenges based on race. So we were concerned more, I think, as much about Willie Lee Stewart's conviction but also about potential for a retrospective effect of such a rule should the circuit court adopt it.

Mr. Allen: Well, that was quite a saga.

Judge Nebeker: Indeed it was.

Mr. Allen: The *Willie Lee Stewart* case was a reminiscence about a case that ended while you were back in the U.S. Attorney's Office. You have suggested now that we take up one more case that you think is worth describing from your career when you were on the Court of Appeals, and that's *Neuman v. Neuman*, 377 A.2d 393 (1977).

Judge Nebeker: Yes, it's an interesting anecdote really, you'll see, the reader will see, I think, why. *Neuman v. Neuman* was a divorce and a child custody case. Incidentally, it's N-E-U-M-A-N, and it was a hard-fought divorce, bitter, and, of course, in those situations the transcript gets rather expensive. So, the female, I've forgotten her first name, appealed and filed an application under 28 U.S.C. § 1915, the *forma pauperis* statute – to proceed *in forma pauperis*, because she said she couldn't afford the transcript and I know it was a substantial transcript. We ultimately got it. Her husband filed an opposition to the motion. An interesting question of standing, isn't it?

Mr. Allen: Yes.

Judge Nebeker: But in any event, he informed the court that he didn't believe that she was incapable or unable to afford the costs. He gave as an example a Thanksgiving telephone conversation with their daughter who was visiting the mother in New York and in her office overlooking Madison Avenue where the Thanksgiving Day parade was being conducted, and observed that she was relatively affluent in some business up there with that kind of office space.

Mr. Allen: This is the daughter or the wife?

Judge Nebeker: Well, this was the husband who opposed, citing this anecdote, or example of why her affidavit of indigency was false.

Mr. Allen: Because the daughter had an office on Madison Avenue?

Judge Nebeker: No, the former wife had it and was there with the daughter and he had a telephone conversation with the daughter on Thanksgiving. She described where they were watching the parade. So based upon that pleading, the Clerk of the Court, Al Stevas, got a telephone call from the former wife's counsel and was informed that they were going to dismiss the appeal, and that the motion was in the mail. Somehow or another, the husband's lawyer learned of this and called his client and advised him that the appeal was to be dismissed and that he was free to marry another woman he was interested in marrying. So, Mr. Neuman proceeds to marry the second woman.

Mr. Allen: No order had been – but the appeal?

Judge Nebeker: No order had been entered but the motion was in the mail. Well it was about eight to ten days before that motion arrived in the Clerk's Office and when we got it, it was apparent all he was dismissing was the application to appeal *in forma pauperis*.

Mr. Allen: It wasn't dismissing the appeal.

Judge Nebeker: It wasn't dismissing the appeal.

Mr. Allen: So there was no final order of divorce.

Judge Nebeker: And so this Mr. Neuman was out there I guess committing bigamy at this point. Of course, nothing was made of it, but the transcript was ultimately prepared and we approached the case on the merits. But in learning about the motion to dismiss, we discovered from Mrs. Neuman's lawyer that she was a Professor of Law at Catholic University and that her certificate of

service said that she had put the motion in the U.S. Mail, but, in fact, had deposited it with the campus mail and the campus mail took extra days before it was placed in the U.S. Mail. The opinion of the court reflects that we, based upon counsel's fault or erroneous certificate of service, had caused considerable prejudice to Mr. Neuman and, accordingly, the court refused to address the merits of the issues respecting the validity of the divorce. We did not, however, impose that sanction with respect to the issues of custody and we went ahead and ruled on the merits of those and we affirmed them. But it's an interesting twist to ordinary appellate litigation. I often use this case as an example to teach the appellate advocacy seminars that I taught at American University what it means to certify that you have put a pleading in the U.S. Mail, you better mean you put it in the U.S. Mail and not in some other alternative method. As a further anecdote to this lesson, when I was Chief Judge of the U.S. Court of Appeals for Veterans Claims, there would be instances in which the Board of Veterans Appeals would put their decision in the Department of Veterans Affairs mailing system, and it would languish there for a number of days, particularly during a holiday season or over a weekend; it would languish there before it was ultimately placed with the U.S. Postal Service, and of course, the time to note an appeal from an adverse board decision was running and we ran across a number of cases in which this delay while it was in the VA mailing system had caused the veteran to note his appeal in

an untimely fashion because he didn't get notice of it until after it was delivered and by that time the time had expired or nearly expired in which he could file a notice of appeal. Calling upon *Neuman v. Neuman*, I think I wrote the decision for the Veterans Court that required VA to deposit their numerous mailings to veterans benefits applicants directly in the U.S. Mail and not in the Department of Veterans Affairs mail.

Mr. Allen: I think probably issues of getting things filed on time causes more anxiety among lawyers than almost anything else.

Judge Nebeker: Indeed they do. Indeed, now this is just an aside; I have never done it yet, but when I was teaching appellate advocacy I wanted to give them a question where – and this is strictly one that I conjured in my imagination – a lawyer goes to church and picks up a church calendar that has been misprinted. He takes it to his office, and he uses that calendar to calculate due dates. Now the misprint in the calendar has made him late on a notice of appeal. What redress would the client have against the church or its printer of the calendar? (Laughs)

Mr. Allen: That's a great class joke. Some say yes and some say no.

Judge Nebeker: (Laughing) Some say yes and some say no. In any event, shall move on?

Mr. Allen: Move on to Office of Government Ethics or wherever you want to go next.

Judge Nebeker: We don't necessarily segue to it, but there are just two things I'd like to mention about my period there. When I had retired from the D.C. Court of Appeals in 1987, I intended to return as a senior judge. While vacationing

that summer, I received a telephone call from a friend – as a matter of fact, his name was Richard in the White House. He was Assistant Counsel to the President – wanting to know if I would be interested in being the Director of the Office of Government Ethics because that director had or was about to – no, he had resigned and there was an acting director at the time, a former colleague of mine in the U.S. Attorney's Office by the name of Bob Campbell. Well, I came up and was interviewed by the Director of the Office of Personnel and the Director of Personnel was in the White House itself. I was later interviewed by Constance Horner, the Director of OPM, who incidentally I became quite friendly with and indeed sponsored her membership in the Cosmos Club here in Washington, D.C. In any event, I was offered the job and I accepted and I remember when I accepted to the Director of Personnel of the White House, I said, "But I have one request." And he said, oh, in a tone of voice, "Oh no, what is it now?" And I said, "Well, my mother is 86 years of age; she is out in Utah and I would love to be able to introduce her to the President." His response was, "Oh, that can be arranged definitely." So, I sent mother a ticket and she flew to Washington and we took her into the White House at the appointed time and were ushered into the Cabinet Room while we were waiting; the President was in the Oval Office. My mother was so awestruck by the idea of being in the Cabinet Room and walking around and seeing the pamphlets, note-taking paper on the table, I think she even snatched one. But then we were

ushered into the Oval Office and I can recall saying to President Reagan, "Mr. President, it is my honor to introduce my mother, a congenital Republican." And he took a double take at that and within a matter of a breath said, "Well, I can't lay claim to that," recalling of course that he had at one time been a member of the Screen Actors Guild and a member of the Democratic Party. In any event, that's a digression.

Mr. Allen: It's a fine one.

Judge Nebeker: I then took over the Office of Government Ethics and, thanks to their staff, was able to get up-to-speed fairly soon. That was one of the most competent staffs I have ever worked with. They were very dedicated people and they knew their business. They were wonderful lawyers. There came a time when the Congress had passed an act called, "The Post Employment Act of 1988," and I had gone to the House Committee, Government Affairs Committee, to testify on that act. I zeroed in on the provision that forbids government employees from accepting honoraria for speeches given on their own time, not on government time. It primarily affects scientists and doctors who were in NIH and elsewhere in the federal government who were academics of one kind or another and were in demand and could indeed augment their income substantially by a speaking tour. The member of the Committee that came out to hear my testimony, it turns out, was a former justice on the New Hampshire Supreme Court and a very close friend, and when I testified that I didn't think that particular prohibition was

constitutional, in a friendly way he scoffed. Nonetheless, they passed the statute and the President signed it into law and we now know that the case ultimately wound up in the Supreme Court and they reversed that particular provision on the ground that it indeed did violate the First Amendment right of those people who were speaking on their own time and not on the government's time.

Mr. Allen: Some of you were —

Judge Nebeker: Apparently so. The other —

Mr. Allen: The member of Congress, the former New Hampshire Supreme Court Judge was who?

Judge Nebeker: We will fill in that name later when I proofread this stuff, I'll get it. [Charles Douglas] In any event, the other episode while I was at the Office of Government Ethics that's worth noting is when the Congress was under pressure to adopt ethical standards for their employees and members, similar to the ones that were applicable to the Executive Branch. The House cobbled together a bill that purported to do that, and convinced the Senate to pass it and then the usual comes from the Office of Management and Budget for all executive agencies to express a view whether the President should veto the bill or sign it into law. I had been living with those things since I was Chief of the Appellate Division in the United States Attorney's Office because the Department of Justice would buck an awful lot of that legislation over to me and I'd have to draft the memo for the Department. I

always knew that the OMB wanted these things the next day. There was very, very little short time schedule on it, so in any event, I put together, along with the help of my staff, a message recommending disapproval of that bill. When I got into reading the bill itself, the black-letter headings, the bold-faced headings of the various sections were quite laudatory but all they did is express a purpose. When you got to the actual substance of the legislation it had none whatsoever. I was appalled, and so I edited my message to the President that "when one reads the substance of the bill, one can recognize the disingenuousness of the exercise." A few days later, I received a telephone call from someone at the White House – I can't recall now who – saying that the President wanted to know if I had any objections to him attaching my recommendation to his veto. Of course, I said it would be all right, not that I could have said no and been very effective, I'm sure. But in any event, a few days later, I get a telephone call from the sponsor of this bill in the House who was as irate as I had ever heard a man being, took particular umbrage at the fact that I would say that it was a disingenuous exercise. This sponsor had apparently cashed a number of "chips" with his colleagues in order to get them to vote for this thing, and he was quite upset that it had been vetoed at my recommendation. There might have been another recommendation, too, I don't know. But in any event, my choice of words offended him and my only response to him was, "Barney, I've been in the business of calling them as I see them since 1969 and that's the way I

saw this exercise." That sponsor was Congressman Barney Frank from Massachusetts. End of saga.

Mr. Allen: Interesting story. The result then left them without a statutory code of ethics for Congress and its staff.

Judge Nebeker: That is correct and the President's veto message urged that they put together one that was acceptable. I think they've done that now; at least – I haven't followed it that closely – they do have ethics committees. We hear about that all the time in the newspapers, and there must be some standards they go by, but whether they were enacted law requiring the signature of the President, is probably very doubtful. I don't think they have to have had the signature of a President.

Mr. Allen: Well, they can adopt their own rules.

Judge Nebeker: They can adopt their own rules.

Mr. Allen: To make it federal law or to put, for example, civil or criminal sanctions in it, they'd need to enact.

Judge Nebeker: I am not aware now of whether they have done that.

Mr. Allen: But at the time, it was such a weak version that it didn't appear to you to be worth signing.

Judge Nebeker: It had virtually no substance to it whatsoever.

Mr. Allen: Interesting episode. Anything more on OGE that you think is worth discussing today.

Judge Nebeker: No, I don't think so. I got a call while I was there, again from I think it might have been Dick Hauser again wanting to know if I would be interested in being the Chief Judge of the Court of Veterans Appeals. I didn't even know it existed; I said, "Well let me go check it out." I went into the little law library we had there and read Title V and when I saw that the court could have three to seven members and that they would be paid – that is the associate judges would be paid at the rate of the U.S. District Court and the Chief Judge would be paid at the U.S. Court of Appeals salary, I decided I could accept that job. I went through a confirmation process with Senator Cranston from California who took a very dim view of my having been a member of the Lawyers Club of Washington and of the Cosmos Club because neither admitted women. And I finally received a letter from Cranston saying that he would not report me to the floor for confirmation unless I resign from the Cosmos Club. I wrote back and said to him that I was working from within to have the Club admit women and that we were on the verge of it. This was in April and the meeting for the Club was scheduled for May, at which the bylaw change would be proposed and I had earlier been conducting symposia with the Club members convincing the Club members that it was the right thing to do to amend the bylaw to admit women, and also, that if we continued to fight it as a matter of law we weren't going to win it. We had the *Rotary Club* case out of the Supreme Court staring us in the face and we knew, at least I knew, that its

time had come and we should do so gracefully. Well, when I refused to resign from the Club, I sent this letter telling Cranston that I was working from within and that I believed that was better than using the iron heel of the chancellor, I think that was the way I put it to him. He backed off and held my confirmation hearing and was very cordial about the whole thing but he said to me, "Now if they don't adopt this bylaw change, I expect you will resign from the Club." I never had to make that promise good because I was very confident that women would be admitted and indeed they were by a unanimous vote of the Club membership. The most well-attended meeting the Club had ever had. The same happened, incidentally, with the Lawyers Club of Washington, only not with a big fanfare.

Mr. Allen: Okay. This is Side B and we have just been talking about the Cosmos Club.

Judge Nebeker: And the confirmation hearings.

Mr. Allen: The confirmation hearings for the Veterans Affairs Court.

Judge Nebeker: I don't know what possessed me to do it, but during that hearing when Senator Cranston wanted me to promise to resign from the Cosmos Club if it did not admit women in the next weeks, he then asked me why does the Cosmos Club not admit women. And my response – and it even surprised me – I just looked at him and said, "Because of men of your age, Sir."

Mr. Allen: (Laughing) That's wonderful.

Judge Nebeker: (Laughing). And it was true. It was the older men that wanted the status quo and they didn't want to be forced into having women admitted to the

Club. But when push came to shove and when a vote was called, many who stood in opposition at the meeting during the floor discussion, nonetheless voted in favor of it. And one of the greatest things I've ever seen him do was when Walter Washington was there, silence fell and he stood, was recognized by Tedson Meyers who was the President of the Club at the time, and I don't recall his exact words at all, but it was so succinct and so short; it was we all know – it was something to the effect that, We all know what's right, now let's get about and do it. I really think it had an effect on all the members there because the vote was called upon and the records reflect it was unanimous.

Mr. Allen: And he was probably as popular a man in the District as there was.

Judge Nebeker: Oh, yes, without a doubt he was and respected by the Club members as well.

Mr. Allen: Right. Well, that's a great story.

Judge Nebeker: And I guess that perhaps would sum it up unless we decide to have a special session a little later on.

Mr. Allen: Well, I'm sure that you are going to have some recollections of things at OGE and at the VA and perhaps the Court of Appeals that we are going to want to go back over. It is now just about 11:00 a.m. on November 23 and should we end for today?

Judge Nebeker: Yes.